National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 16, 1994

TO: William C. Schaub, Regional Director, Region 7

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

530-4825, 530-6067-2025

This Section 8(a)(5) and (1) case is submitted for advice as to whether an employer unlawfully implemented unilateral changes after reaching impasse on those subjects, at a time when the Union won the election but had not been certified because the Employer filed objections.[(1)]

FACTS

On January 27, 1994[(2)], in Case 7-RC-20223, pursuant to a Stipulated Election Agreement, an election was held in which there were 48 ballots cast for the UAW, 30 against, and 15 challenges. On February 2, the UAW representative sent a letter to the Employer demanding bargaining. On February 3, the Employer timely filed objections to the election. On March 11, the Employer's attorney sent a letter to the Union stating that 25 employees would have to be laid off or transferred "due to the termination of a current program."

He also stated that the Employer was considering changes in the health insurance program. Without conceding that the Employer had an obligation to bargain with the Union, the Employer's attorney offered to bargain with the Union only concerning layoffs and transfers, i.e., the effects of the termination of the current program, and health insurance.

On March 22 and 29, the Employer and the Union met in bargaining sessions limited to these issues. During the March 22 meeting the Employer told the Union that it wanted to pass along the entire cost of an increase in health insurance premiums to the employees.[(3)] In April the parties exchanged numerous letters concerning these issues. The Region found that the Employer and the Union engaged in meaningful bargaining about the layoffs, transfers and health insurance. The Region also found that the parties reached impasse concerning health insurance premiums. After impasse, the Employer implemented its last health insurance premium proposal, which constituted a change from the past practice of paying part of increases in premiums.

On May 3, the hearing officer issued a report and recommendation to the Board in which he recommended that the objections be overruled and that the Union be certified as the representative of the unit employees. The Employer filed exceptions to the hearing officer's report and the matter is currently pending before the Board.

On June 10, the Region issued Complaint in Case 7-CA-35878 alleging that the Employer violated Section 8(a)(1) of the Act by: threatening plant closure if the employees selected the Union; soliciting employees to undermine and campaign against the Union; polling employees illegally; creating an impression of surveillance of union activities; disparaging employees who supported the Union; and implying unspecified retaliation against employees for their union activities.

ACTION

We conclude that, if the Board affirms the report and recommendation of the hearing officer and certifies the Union as the Section 9(a) representative, the Region should allege that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally shifting all of the increased cost of its health insurance premiums to its employees without having reached a good faith impasse with the Union, at a time when the Union won the election but had not been certified because the employer filed objections.[(4)]

Under Board law, while an employer is challenging a union's election victory, it acts at its peril if it makes changes in terms and conditions of employment without bargaining to a good faith impasse with the union.(5)

Thus, if the union is eventually certified, these unilateral changes would violate Section 8(a)(5).(6)

In the instant case, we conclude that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally shifting all of the increased cost of its health insurance premiums to its employees without having reached a good faith impasse with the Union. The Employer here was under an obligation to bargain in good faith with the Union as to any changes it made in unit employees' terms and conditions of employment. The question is then whether the Employer reached a good faith impasse in bargaining as to its proposed change in who pays the cost of increased health insurance premiums.(7)

We conclude that the parties did not reach a good faith impasse because the Employer unlawfully restricted collective bargaining to only two mandatory subjects: layoffs and transfers, and health insurance premiums. The Union clearly wished to bargain with the Employer about the full range of collective bargaining issues.(8)

The Employer's restriction of bargaining to only two mandatory subjects when there were other subjects, such as wages and other benefits, which were crucial elements of the bargaining relationship, prevented a good faith impasse. In this regard, we note that if the Union had the opportunity to engage in the normal give and take of bargaining, in which concessions on some subjects could be traded for concessions on others, the parties might have reached agreement on who would bear the cost of the increased health insurance premiums. Thus, in these circumstances, the impasse on the increased cost of health insurance did not constitute a good faith impasse in bargaining on that issue.(9)

We conclude, therefore, that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally increasing the cost of health insurance premiums paid by employees without reaching a good faith impasse with the Union.

The Board's decision in Howard Plating Industries, Inc.(10)

does not require a contrary result. In that case, the Board held that it was not a violation of Section 8(a)(5) and (1) of the Act for a respondent to refuse the union's request to initiate collective bargaining pending final Board resolution of timely filed objections.(11)

The Board held that a Section 8(a)(5) violation would not arise in such circumstances unless there was additional evidence, drawn from the respondent's "whole course of conduct", which proved that its refusal to bargain was part of a bad faith effort by the respondent to avoid its bargaining obligation.(12)

We realize that one could argue that, under Howard Plating, the Employer was not obligated, pending final resolution of its objections, to bargain about other subjects such as wages or other benefits and therefore, the Employer was privileged to refuse to bargain about such issues in connection with its bargaining about its proposed change in health insurance premiums. Under this rationale, the impasse would have been reached in good faith. It is true that the Employer is obligated to bargain with the Union, pending resolution of the objections, only about matters which it proposes to change, such as the health insurance premiums. However, benefits such as health insurance are closely related to other monetary benefits, such as wages. Often, parties trade one off for the other and therefore, bargain for these items as a package. Consequently, we would argue here that bargaining in isolation about increases in the health insurance premiums when the Union has requested full bargaining does not allow a good faith impasse to occur as to that subject. Also and very importantly, the Employer, unlike in Howard Plating, engaged in other conduct which indicated that the bargaining over the increase in the health insurance premiums was part of its bad faith effort to avoid its bargaining obligation.(13)

Thus, the Employer unlawfully made other unilateral changes, in the production rates and the smoking policy, without bargaining at all with the Union. Therefore, Howard Plating is distinguishable from the instant case.

Accordingly, we conclude that the Region should also allege that the Employer violated Section 8(a)(5), and (1) by unilaterally

increasing the cost of its employees' health insurance premiums without having reached a good faith impasse with the Union. (14)

R.E.A.

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[1] The Region decided that it will partially dismiss the charge with regard to an alleged change in vacation pay policy and with regard to a reorganization of the plant which resulted in demotions, layoffs, changes in shifts and rates of pay. The Region also decided that Complaint should issue with regard to alleged unilateral changes in the production rates and the smoking policy.

[2] All dates are in 1994 unless otherwise indicated.

[3] The Employer's past practice had been that when increases were due in the cost of health insurance premiums, the Employer and the employees would each pay for part of the increase.

[4] Of course, if the Board overrules the recommendation of the hearing officer and holds that the Union did not win the election, all the Section 8(a)(5) allegations against the Employer should be dismissed, absent withdrawal.

[5] Mike O'Connor Chevrolet-Buick-GMC Co., Inc., 209 NLRB 701 (1974).

[6] Id.

[7] This proposed change was employees' bearing all the cost of the increase in health insurance premiums rather than only part, as in the past.

[8] Consequently, the Union's failure to protest the Employer's consent to bargain over only these two subjects is irrelevant. The Union was given no choice; if it wanted to bargain at all with the Employer at this time, its bargaining would be limited to these two subjects.

[9] Cf. Sacramento Union, 291 NLRB 552 (1988), in which the Board found that even if the parties reached impasse on a major issue, Guild security, this did not mean that overall negotiations were at impasse because wages, identified as a major issue by the parties, had not been fully discussed.

[10] 230 NLRB 178 (1977).

[11] Id. at 179.

[12] Id.

[13] We also note that there is an outstanding Section 8(a)(1) complaint against the Employer in another case, Case 7-CA-35878, which clearly indicates anti-union animus.

[14] The Board's decision in Garrett Flexible Products, 276 NLRB 704 (1985), does not require a contrary result in that there the Board found that the employer violated Section 8(a)(5) and (1) of the Act by increasing the health insurance premiums paid by the employees without bargaining in good faith with the union.